IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

LATIF WILLIAMS,

Defendant.

REPORT AND RECOMMENDATION

16-cr-08-wmc

REPORT

The grand jury has charged defendant Latif Williams in a superseding indictment with possession of a firearm as a prohibited person, possession of heroin with intent to distribute it, and possession of the firearm in furtherance of the drug crime charged in the indictment. *See* dkt. 14. The firearm, heroin, and other evidence against Williams all were seized during the November 19, 2015 execution of a search warrant issued by the Circuit Court for Dane County, Wisconsin, to the Dane County Narcotics Task Force. *See* dkt. 13-1.

On March 28, 2016, Williams filed a motion to quash the search warrant and suppress the evidence seized. Dkt. 13. About two weeks later, on April 12, 2016, the Court of Appeals for the Seventh Circuit held that it is unconstitutional for the police to send a trained drug detection dog into an apartment building's common hallway to conduct a warrantless sniff outside a suspect's apartment door. *United States v. Whitaker*, ___ F.3d ___, 2016 WL 1426484 (7th Cir. April 12, 2016). The court held that this conclusion has been obvious for fifteen years as the logical and reasonable implication of the Supreme Court's decision in *Kyllo v. United States*, 533 U.S. 27 (2001) (the thermal imager case). *Id.* at *5. *Whitaker* now is the law of this circuit, and the government cannot avoid its effect on the warrant issued in this case. Accordingly, it seems that this court must grant Williams's motion to suppress.

THE SEARCH WARRANT AFFIDAVIT

Williams had submitted a copy of the "Complaint for Search Warrant" (dkt. 13-1) that speaks for itself. By way of synopsis, Dane County Sheriff's Detective Joel Wagner submitted an affidavit in support of his request for a warrant to search Latif Williams's residence at 2511 Pheasant Ridge Trail, Apt. 6, in the Town of Madison. The apartment building at 2511 Pheasant Ridge Trail has a locked main entrance door. The interior atrium is a common area that has a staircase that leads to the second floor hallway where Apartment 6 is located.

On November 4, 2015, Det. Wagner and a colleague met with a confidential informant identified as CI 1673. Det. Wagner states that "CI 1673 has provided accurate and reliable information in the past to [Det. Wagner]." Dkt. 13-1 at 6. CI 1673 stated that he knew a man named Latif Williams, born on April 14, 1981, "who was selling large amount of heroin." *Id.* CI 1673 had been with Williams when he sold heroin. CI 1673 knew that Williams lived in an apartment at 2511 Pheasant Ridge Trail but did not know the apartment number. CI 1673 reported that Williams drives a silver sedan, possible a Buick or Pontiac, and uses the street name "Ricardo DeFlair." CI 1673 positively identified a booking photograph of Latif Williams as the person he was talking about.

Det. Williams checked various public records and learned that in 2006, Williams had been charged with and convicted of five counts of manufacturing cocaine. Williams was released from prison on January 10, 2012 and was on parole until January 10, 2016. In 2015, Williams received traffic tickets while driving a silver Buick Park Avenue. During surveillance on November 9, 2015, Det. Wagner saw this silver Buick Park Avenue parked in the lot outside the main entrance to 2511 Pheasant Ridge Trail.

On November 9, 2015, Det. Wagner visited the multi-building apartment complex that included 2511 Pheasant Ridge Trail. The complex's manager, Anne Cox, did not recognize a photograph of Latif Williams. According to Cox, the only authorized occupant for Apt. 6 was Dorrie Williams, born in 1955. The maintenance supervisor, Andy Likwarz, had never seen anyone who fit Dorrie Williams's description in the apartment. Likwarz, however, recognized Latif Williams as one of the residents in Apt. 6, a two bedroom unit that appeared to be occupied by Williams, a mid-20s woman, and perhaps a child. Likwarz related what he viewed as a "strange" service call involving Williams just a week earlier, when Likwarz visited Apt. 6 to fix a plumbing problem: each time Likwarz went into and out of the apartment, Williams quickly relocked the deadbolt and fastened the inside chain lock. Likwarz commented to Det. Wagner that he had never seen a tenant lock the doors so quickly.

Det. Wagner obtained from Cox written consent for a canine search of the hallways of 2511 Pheasant Branch Trail. On November 11, 2015, Det. Wagner accompanied Sheriff's Deputy Jay O'Neil and his canine partner Hunter as they searched the upstairs hallway of that building. Det. Wagner provided background information for Hunter and Deputy O'Neil establishing that the duo was a qualified and accurate drug detection team. During the November 11, 2015 search of the upstairs common hallway, Hunter alerted to the odor of narcotics emanating from the door Apt. 6. The state court issued the requested warrant, and the evidence charged against Williams in this case was obtained when executing it.

ANALYSIS

The court begins its analysis with Williams's citation in his reply brief (dkt. 21) to *United States v. Whitaker*, *supra*, 2016 WL 1426484. The government filed a surreply (dkt. 24) that

attempted to distinguish *Whitaker,* followed by Williams's final supplemental reply brief, dkt. 25. The bottom line is that Williams prevails: the holding in *Whitaker* requires this court to quash the search warrant issued for Williams's apartment. Although the government currently is mulling whether to seek rehearing *en banc* to overturn or limit *Whitaker*, *see* Gov't Suppl. Reply Br., dkt 24 at 2, n.2, right now the *Whitaker* panel's decision is the law of this circuit. This means that all warrantless dog sniffs outside of apartment doors that have occurred since 2001 have been "unreasonable search[es] in violation of the Fourth Amendment." *Whitaker*, 2106 WL 1426484 at *5.

There is room to question the *Whitaker* court's basis for making its decision retroactive. For instance, the court seems to have overstated its case when it announced:

> Moreover, *Kyllo* was decided before the search of Whitaker's apartment. The logic of *Kyllo* would have reasonably indicated by the time of this search that a warrantless dog sniff at an apartment door would ordinarily amount to an unreasonable search in violation of the Fourth Amendment.
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> *Whitaker* at *5.

Actually, as of November 11, 2015–the date of the challenged search in this case–the law of this circuit would seem to have allowed Deputy O'Neil to walk Hunter up the stairs in the apartment alcove and past the door to Apartment 6 to perform a drug sniff of the apartment door.

As a starting point, the court in *Whitaker* conceded that under binding Seventh Circuit precedent, at the time of the search at issue in that case, (January 7, 2014, also by Hunter and Deputy O'Neil in Madison, Wisconsin) "there was no recognized expectation of privacy in the common areas of a multi-unit apartment building." 2016 WL 1426484 at *5, *citing United States v. Espinoza*, 256 F.3d 718, 723; *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991); *Henry v. City of Chicago*, 702 F.3d 916 (7th Cir. 2012). The court in *Whitaker*, however, distinguished these

cases from its facts on the ground that a drug-sniffing dog is a "super-sensitive instrument," which no court in this circuit ever has allowed to be employed outside an apartment door.

This distinction, however, is not well-grounded. Until *Whitaker*, the clear law in this circuit was that drug-sniffs by trained canines did *not* constitute searches. *See United States v. Gutierrez*, 760 F.3d 750, 755 (2014), *citing United States v. Brock*, 417 F.3d 692 (7th Cir. 2005). The court in *Gutierrez* parsed its decision in *Brock*:

> *Brock* relied on the numerous Supreme Court decisions holding that a drug-dog sniff does not constitute a search for Fourth Amendment purposes because it reveals only the presence or absence of narcotics and therefore implicates no privacy interest. . . . We acknowledged that, unlike those cases, the dog sniff in Brock's case occurred in his *home*. But we rejected Brock's reliance on *Kyllo v. United States*, 533 U.S. 27 (2001), which involved a thermal imaging search of the defendant's home. The *Kyllo* Court had emphasized that the use of a thermal imaging device revealed both lawful and unlawful conduct, so we reasoned that a dog sniff was different because the Court had repeatedly explained that a dog sniff detected only contraband and was not even a Fourth Amendment 'search.' *See, e.g.,* [*United States v. Place*, 462 U.S. 696, 707 (1983)] . . .
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> *Brock* therefore held that 'the dog sniff inside Brock's residence was not a Fourth Amendment search because it detected only the presence of contraband and did not provide any information about lawful activity over which Brock had a legitimate expectation of privacy. . . We further explained 'Critical to our holding that the dog sniff in this case was not a Forth Amendment search is the fact that police were lawfully present inside the common areas of the residence with the consent of Brock's roommate." [417 F.3d at 697].
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> *United States v. Gutierrez*, 760 F.3d at 755, citations omitted, emphasis in the original.

In *Gutierrez*, the police had taken a drug-sniffing dog to the defendant's front door in November 2012, before the Supreme Court's decision in *Florida v. Jardines*, ___ U.S. ___, 133 S.Ct. 1409, 1414-16 (March 26, 2013) holding that such conduct constituted a trespass. The court in *Gutierrez* noted that:

> Before *Jardines*, the Court had explicitly allowed police officers both to use dog sniffs and to enter the curtilage to seek information–both without a warrant. (Indeed, both actions remain permissible even after *Jardines*, so long as they are done separately.) The Court had never suggested that, when combined, these individually lawful actions might become unlawful.
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> *United States v. Gutierrez*, 760 F.3d at 756.

In short, long after the Supreme Court's decision in *Kyllo*, this circuit repeatedly had held that dog sniffs were not Fourth Amendment searches, going so far as to explicitly distinguish dog sniffs from the devices at issue in *Kyllo*. Then, as a result of *Jardines*, this circuit acknowledged that the rules had changed a bit: police *no longer* could enter the *curtilage* of a defendant's residence with a drug detecting dog.

As noted above, however, even the court in *Whitaker* acknowledges that at the time Deputy O'Neil took Hunter into the hallway of Whitaker's apartment building, the clear law of this circuit was that Whitaker had no privacy interest in that hallway. In other words, the hallway was not part of Whitaker's curtilage. Combining these two points suggests that the search in *Whitaker*–as well as the search in the instant case–should not be suppressed.[1]

Citing to *Davis v. United States*, 564 U.S. 229, 239-240 (2011), the court in *Gutierrez* held that because *Jardines* was decided after the challenged use of the dog on the home's curtilage, it would not suppress the search because it was conducted in reliance on binding circuit precedent. The Supreme Court in *Davis* explained the underlying rationale:

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[1] In a case decided one week ago, the court held that the defendant could not suppress evidence he had hidden in the basement crawlspace of his multi-unit apartment building because it was "not recognizable as curtilage of [defendant's] apartment." *United States v. Sweeney*, __ F.3d __, 2016 WL 2642058 at *5 (7th Cir. May 9, 2016). The court in *Sweeney* acknowledge the court's holding in *Whitaker,* but distinguished it on the facts, including the use of dog-sniff, which now is deemed "a sense-enhancing technology." *Id.* at *7. (Judge Hamilton, who was on the panel in *Whitaker*, wrote the opinion in *Sweeney*.)

> Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis's claim. Police practices trigger the harsh sanction of exclusion only when the are deliberate enough to yield 'meaningful' deterrence, and culpable enough to be "worth the price paid by the justice system." [*Herring v. United States*, 555 U.S. 135 144 (2009)]. The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence. *Ibid.* Nor does this case involve any "recurring or systemic negligence" on the part of law enforcement. *Ibid.* The police acted in strict compliance with binding precedent and their behavior was not wrongful. Unless the exclusionary rule is to become a strict liability regime, it can have no application in this case.
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> *Davis v. United States*, 564 U.S. at 240.

The court in *Whitaker* has unequivocally stated otherwise. It granted the Whitaker's motion to suppress and remanded the case without considering whether there still was probable cause to support the warrant after excising the dog's alert, and without addressing Whitaker's other challenges to the warrant. 2016 WL 1426484 at *1. Indeed, the court *sua sponte* raised the specter of an Equal Protection violation, going so far as to supplement the appellate record with information the court had gleaned from an internet search of national household demographics to warn that "a strict apartment versus single-family house distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race and ethnicity." *Id*. at *4.[2]

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[2] In *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015), Judge Hamilton noted that

> [t]he ease of research in the internet has given new life to an old debated about the propriety of and limits to independent factual research by appellate courts. To be clear, I do not oppose using careful research to provide context and background information to make court decisions more understandable. By any measure, however, using independent factual research to find a genuine issue of material, adjudicative fact, and thus to decide an appeal, falls outside permissible boundaries. Appellate courts simply do not have a warrant to decide cases based on their own research on adjudicative facts."
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> *Id.* at 638 (Hamilton, J., concurring in part and dissenting in part), footnote omitted.

Because the court's Equal Protection concerns in *Whitaker* are dicta, there is no point in holding them up to Judge Hamilton's template in *Rowe*. Even so, simply by raising these equal protection concerns, the court has signaled how strongly it disapproves of drug-sniffing dogs searching the common hallways of apartment buildings. This may be a good reason to prohibit this practice going forward, but this is a different concern from whether the police were operating within the constraints of existing circuit precedent at the time Deputy O'Neil took Hunter past Apartment 6.

Therefore, the alert by the drug-sniffing dog outside Williams's apartment door must be redacted from Det. Wagner's affidavit in support of his search warrant application. This leaves the report of CI 1673– with no *actual* reported track record of reliability, *see United States v. Koerth*, 312 F.3d 862, 867 (7th Cir. 2002)–who claimed that Williams was selling large amounts of heroin from an apartment at 2511 Pheasant Ridge Trail, and that CI 1673 had seen at least one of these sales, although CI 1673 did not provide dates, locations, or any other details, other than to describe Williams's car. Next, Williams had been convicted of manufacturing cocaine and still was on parole. Finally, the apartment maintenance supervisor was able to place Williams into Apt. 6–which apparently he was renting through an intermediary–and report a recent service call during which Williams was hypervigilant about lock security at the front door.

These facts do not establish "a substantial basis to conclude that the search was reasonably likely to uncover evidence of wrongdoing." *United States v. Reichling*, 781 F.3d 883, 886 (7th Cir. 2015) quoting *United States v. Aljabari*, 626 F.3dd 940, 944 (7th Cir. 2010). Citing to and quoting other cases, the court in *Reichling* noted that probable cause is established when, based on the totality of the circumstances, the affidavit sets forth sufficient evidence to induce a reasonably prudent person to believe that a search will uncover evidence of a crime. *Reichling*, 781 F.3d at 886. Even with the alert by the drug dog, this would have been a close call on probable cause, but then the issued warrant would have been entitled to deference, and the government could have asked for application of the good faith doctrine under *United States v. Leon*, 468 U.S. 897, 926 (1984). With a redacted warrant affidavit, these accommodations are not available to the government. Without the alert by the trained drug detecting dog, the warrant falls.

CONCLUSION

> Ours is a hierarchical judiciary, and judges of inferior courts must carry out decisions they believe mistaken. A . . . judge who thinks that . . . better argument 'refutes' one of our decisions should report his conclusions while applying the existing law of this circuit.
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> *Gacy v. Welborn*, 994 F.2d 305, 3101993).

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I am recommending that this court GRANT Defendant Latif Williams's motion to quash the search warrant.

Entered this 16th day of May, 2016.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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May 16, 2016

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Re: United States v. Latif Williams
Case No. 16-cr-8-wmc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before May 31, 2016 at noon, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by May 31, 2016 at noon, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Susan Vogel for Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**